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No. 872

In the Supreme Court of the United States

OCTOBER TERM, 1958

NORTH CENTRAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. B) is not yet reported. The findings and orders of the Civil Aeronautics Board (R. 480–519, 558–560) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 29, 1959. The petition for a writ of certiorari was filed on April 28, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Civil Aeronautics Board disapproved petitioner's acquisition of the majority stock of Lake

Central Airlines on grounds that the routes of the two local service carriers were not complementary and a merger would endanger petitioner's continued concentration upon local service needs. The management of Lake Central had been found not to meet the statutory test of fitness, and the carrier's authority to continue in operation had been renewed only after the principal owners had been removed from control through placing their stock in a voting trust pending consideration of its acquisition by petitioner or other appropriate disposition. The Board subsequently permitted a modification of the voting trust, making possible a contingent sale of the stock, subject to petitioner's previously acquired rights, to a group of Lake Central employees. It also permitted the contingent purchasers to intervene in the acquisition proceedings. The questions are:

1. Whether the Board improperly converted the acquisition hearing into a comparative proceeding between petitioner and the Lake Central employees' group.

2. Whether the Board's modification of the voting trust agreement to permit the contingent purchase prejudiced the rights of petitioner in the acquisition proceeding.

3. Whether the Court of Appeals properly found no error in certain conversations, occurring prior to the acquisition hearing, between Board members and the employees' group concerning the possibility of the latter's conditional acquisition of Lake Central stock.

4. Whether the Board's determination that petitioner's acquisition of Lake Central would be incon-

sistent with the public interest was improper.

STATUTE INVOLVED

The relevant provisions of the Civil Aeronautics Act of 1938, as amended,[1] are set forth in the Appendix, *infra*, pp. 17–21.

STATEMENT

Petitioner and Lake Central Airlines are subsidized local service air carriers.[2] During proceedings in 1951 on Lake Central's application for renewal of its then temporary certificate of public convenience and necessity and for expansion of its system (*Indiana-Ohio Local Service Case*, Docket 4034), evidence indicating misconduct on the part of the carrier's management (members of the Weesner family who owned more than 95% of the stock) led the Board's examiner to find that Lake Central was not "fit" to receive continued operating authority.[3] Apparently apprehending unfavorable action by the Board as a result of this finding, the Weesners, on the eve of oral

[1] The provisions of the Civil Aeronautics Act here involved were reenacted without material change in the recent Federal Aviation Act of 1958 (72 Stat. 731, *et seq.*), which became effective on December 31, 1958. Since Section 1501(c) of that Act provides that its provisions are inapplicable to pending cases, we refer only to the provisions of the 1938 Act.

[2] Local service carriers are certificated primarily to meet the need of smaller cities for local and short-haul services to their principal trading centers and for connection with the "trunk-lines" for long-haul services.

[3] Section 401(d) of the Act (*infra*, p. 18) imposes, as conditions to certification, that the carrier be "fit, willing, and able" to perform the transportation service and "to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] * * *."

argument before the Board, contracted with petitioner for sale to the latter of their Lake Central stock (R. 46–62),[4] subject to the Board's approval under Section 408 of the Civil Aeronautics Act (*infra*, pp. 19–21). Shortly thereafter, petitioner filed with the Board formal application (Docket No. 5770) for such approval (R. 43–46, 54).

Following oral argument in the renewal proceedings, the Board found that the public convenience and necessity required both continued operation of Lake Central's route and its extension, but that because of the evidence of managerial misconduct it was unable to make the requisite statutory finding of fitness (*Indiana-Ohio Local Service Case*, 16 C.A.B. 944).[5] Adverting to the North Central-Weesner contract, the Board stated that such transfer of control might eliminate the fitness problem but pointed out (16 C.A.B. at 947) that approval of that contract was required under Section 408 which:

> * * * requires a hearing to determine whether the proposal is itself in the public interest. Such a proceeding is likely to take from 6 to 18 months, especially if more than one buyer should evidence an intention to reach agreement with Lake Central's management on reasonable terms for acquisition of such control. We

[4] The designation "R" refers to the joint appendix filed in the Court of Appeals. Portions of the original record, which were not printed in the joint appendix, are referred to as "TR." Both the original record and the joint appendix have been filed in this Court.

[5] The Board noted that there was no question of "operational fitness," and that the problem related to various activities by carrier's management in violation of the Act.

> would be remiss in our obligation under the Act if we did not now take reasonable steps to provide during this interim period the services which are required by the public interest.
>
> In these circumstances we believe it entirely consistent with the public interest for us to provide an opportunity to the present owners of Lake Central to make what would be considered an offer of settlement if this were an enforcement proceeding. The parties now owning and managing Lake Central have already evinced a desire to withdraw from this company by their execution of the aforesaid merger agreement. Were they to provide through a voting trust an interim substitute management under the direction of a trustee who could be approved by the Board to hold office until the Board should approve either the acquisition of control by [North Central], or some comparable arrangement whereby permanent divestiture of control would be effected, the questions as to the carrier's fitness could be resolved for this interim period.

Within thirty days the Woesners executed such a voting trust agreement, which was accepted by the Board as a basis for an interim finding of fitness. Lake Central's certificate was temporarily renewed, the Board retaining jurisdiction over the trust, and requiring its approval for any modification or changes therein (16 C.A.B. at 887–890, 943).

In the preliminary stages of the acquisition proceeding, a number of other carriers requested consolidation therein of applications to be considered as potential transferees of Lake Central's stock as well

as of applications, including one by North Central for certificates of public convenience and necessity for the routes then served by Lake Central. The Board originally consolidated these other transfer applications with the North Central acquisition docket (Tr. 301) for consideration as potential transferees of the Lake Central stock or routes "in the event [the North Central] agreement is disapproved * * * or in the event of the failure of performance of said agreement by either or both of the parties thereto." (Tr. 306.) Subsequently, however, at the request of North Central and Lake Central the issues in the acquisition hearing were limited to the merits of North Central's proposed acquisition. (C.A.B. Order No. E-9404, Tr. 484.)

Before the acquisition proceeding was reached for hearing, petitioner's financial position had deteriorated to the point of "virtual bankruptcy" (Tr. 897), and there were various postponements in the case at the petitioner's request. There was doubt that petitioner would be able to perform its contract if Board approval were obtained, and the Weesners were taking the position that the contract in any event had been breached and were trying to salvage their investment by a contingent sale to some one else.[1]

[1] The Weesners' position was that the application by North Central for certification for the Lake Central routes constituted a breach as an attempt by petitioner to obtain the routes other than by the contract. This ground, and the one of unwarranted delay occasioned by petitioner, were later urged in an action to obtain a judgment declaring the contract terminated. The District Court agreed but the Court of Appeals reversed. *Hartman v. North Central Airlines*, 144 F. Supp. 885 (S.D. Ind.), reversed, 241 F. 2d 856 (C.A. 7). The opinions therein

A group of Lake Central employees, fearful that the proceeding "was going forward aimed primarily at dismemberment of the airline" (R. 499), developed a program for purchase of the stock from the Weesners. In 1954, the record shows that there were informal conferences between representatives of the employee group and individual Board members as follows (Tr. 1985):

> * * * Before proceeding forward any further with the development of the employee stock purchase program we had informal conferences with each member of the Civil Aeronautics Board in order to ascertain whether or not there was any official objection to our going forward with the stock purchase program, conditioned of course upon the prior rights, if any, of North Central Airlines.
>
> We received no discouragement and were advised that such a program might well be considered as an answer to the question of whether Lake Central should be operated as a separate entity or merged or dismembered.

In June 1954, the employees entered into an option contract with the Weesners for the purchase of the latter's Lake Central stock, subject to the earlier contract with petitioner (R. 302–206), and on October 27, 1954, the Board granted the employees' group leave to intervene in Docket 5770 (the proceeding for approval of petitioner's acquisition contract) (Tr. 430).

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depict the activities of the parties during the period prior to the hearing in the acquisition proceeding, and the District Court's opinion contains a full summary of petitioner's then financial plight (144 F. Supp. at 907–910).

Since the employees did not fall within the purview of Section 408, there was no statutory requirement for Board approval of their immediate acquisition of the stock. Exercise of the option, however, would have run afoul of the provisions of the voting trust agreement which provided that transfer of more than 75% of the trust certificates would terminate that agreement. Termination, also, required Board approval, and this the Board had already refused to give (Tr. 430). Accordingly, the parties to the voting trust agreement executed an amendment thereto which in effect provided for its continuation notwithstanding transfer of 75% of the trusteed stock or trust certificates to new owners. On January 11, 1955, formal application for approval of this amendment was filed in Docket No. 4034 (the old *Indiana-Ohio* case in which the trust agreement had been approved), and approval was granted on February 3, 1955, by Order No. E–8931. The order expressly subordinated the employees' rights to those of North Central, and further found that the Board's action "will not adversely affect the legal rights of any * * * person." The option was exercised, and the trust certificates were transferred to the employees.[1]

After hearing on petitioner's proposed acquisition of Lake Central, the examiner recommended approval

[1] Petitioner subsequently sought rescission of the Board's approval of the voting trust amendment, claiming, *inter alia*, that it had not been served with a copy of the application. The Board refused, pointing out that petitioner was not a party to the proceeding in which that action had been taken, and that it had not been prejudiced either substantively or procedurally (Order No. E–9404). (Tr. 484.)

thereof (R. 482–483). The Board, however, unanimously rejected his recommendation, finding that the acquisition would be inconsistent with the public interest (R. 484–492). The Board found that the two carriers serve separate trade areas having little local service traffic integration, and that unification of the two systems would thus result in a single carrier operating two separate local service systems. This would conflict with a long-established Board policy of confining local service carriers to a single, reasonably compact and homogeneous marketing area in order to assure maximum concentration upon the local service needs for which they are certificated (R. 489). These factors were held to outweigh the subsidy savings which would result from the merger (R. 491).

On review, the Court of Appeals affirmed the Board's conclusions as supported by adequate findings resting upon substantial evidence. It found no inconsistency between the Board's action here and in other merger cases, and concluded that, in exercising its judgment as to the public interest in approving or disapproving the merger, the Board had acted within its reasonable discretion.

Petitioner, although objecting before the Board, did not urge error on appeal with respect to the intervention of the employees' group; the amendment of the voting trust to permit the continuent stock acquisition; or the alleged conversion of the acquisition hearing into a comparative proceeding among all potential purchasers of Lake Central. It made no claim of error before either the Board or the Court of Appeals with respect to the Lake Central employees' group's

conversations with the Board members. However, the court, *sua sponte*, requested further briefing on these questions. The parties responded, and the court stated with respect thereto (Pet. App. B. 39):

> With the assistance of supplemental memoranda from counsel for the parties, the court has explored several questions relating to the procedure before the Board, but we find no reversible error in these respects.

ARGUMENT

1. Contrary to petitioner's contention, this case presents no issue concerning the Board's power to convert acquisition proceedings into comparative assessments of the benefits of various proposals for taking over the business or routes of Lake Central. The proceedings, in conformity with established Board policy,* were directed only to the issue of whether petitioner's acquisition of Lake Central was consistent with the public interest.

The Board did permit intervention by the Lake Central employees' group. But clearly the employees group, as holders of a contingent interest in the controlling Lake Central stock, had standing to intervene. See *Federal Communications Commission* v. *Sanders Radio Station*, 309 U.S. 470, 476-477; *Granik*

*The Board in merger cases has never afforded comparative consideration to other potential applicants in the sense of determining whether it should deny an acquisition which is consistent with the public interest because another proposed plan of merger might be still more so. Instead, the Board has first independently appraised the merger contract before it. Only if its grant is found to be contrary to the public interest have other possible alternatives been explored. (See Tr. 306.)

v. *Federal Communications Commission*, 234 F. 2d 682 (C.A.D.C.). And having standing, they were entitled to urge, as they did, public interest consideration which militated against the merger. This did not convert the proceeding into a comparison between the petitioner and the employees. The Board found that the acquisition of Lake Central by petitioner, considered by itself, would be contrary to the public interest for reasons wholly extraneous to any control of Lake Central by the employees' group. While the Board necessarily considered the ability of Lake Central to operate as an independent carrier in view of petitioner's contentions that its alleged inadequacies were a reason for approving the merger (R. 551), none of the factors upon which the Board predicated its conclusions that the merger would not be consistent with the public interest relates to the relative merits of Lake Central's ownership by North Central as opposed to its ownership by the employees.

2. Likewise, the earlier approval by the Board of the Lake Central employees' contingent purchase of the Weesner stock did not in any way prejudice petitioner's rights to a fair consideration of its acquisition application. Since the employee's group does not fall within the purview of Section 408 of the Civil Aeronautics Act, 49 U.S.C. 488, there was no statutory requirement for Board approval of their contingent acquisition of the controlling Lake Central stock, nor any statutory prohibition against the transfer to them of such stock. Board approval was required solely as a result of the terms of the trust agreement imposed by the Board upon the Weesners

as a condition to the continued certification of Lake Central. Petitioner was not a party to that agreement, and it was not designed for petitioner's benefit but solely to insure that the Weesner family did not resume control of Lake Central. Since the transfer of their stock interest to the employees would not be a device for subverting the purpose of the trust agreement, and since the purchase and transfer were expressly made subject to the prior rights of petitioner, the Board's approval of a modification of the trust agreement to permit the contingent sale and transfer was clearly appropriate and did not in any way increase petitioner's burden in the acquisition proceeding. See *Ashbacker Radio Corp.* v. *Federal Communications Commission*, 326 U.S. 327.

3. While petitioner never raised the matter before the Board or in its appeal below, the court, *sua sponte*, requested the parties to submit supplemental memoranda as to the validity of the Board's decision in the light of certain *ex parte* statements and conversations between the Lake Central employees' group and individual members of the Board prior to the acquisition hearing. Upon consideration of these memoranda, however, it concluded that "we find no reversible error in these respects" (Pet. App. B 39).

The nature of the *ex parte* contacts was spread upon the record of the acquisition hearing (see Tr. 364, 1985). They involved conversations between the employees' group and members of the Board in 1954 prior to the consummation of their contingent purchase of

the Weesner stock, and were primarily directed to the separate proceeding on Lake Central's basic qualifications which had resulted in renewal of its certificate only upon condition that the Weesners be removed from control of Lake Central through the means of the voting trust. The employees' group sought advice from the Board (1) as to any "objection to our going forward with the stock purchase program, conditioned of course upon the prior rights, if any, of North Central" and (2) whether such purchase could be "considered as an answer to the question of whether Lake Central should be operated as a separate entity or merged or dismembered" (Tr. 1985). The requests were natural ones in view of the fact that at the time North Central was in serious financial difficulties and doubt existed as to whether it would or could continue to press for the merger, and since it was not clear whether the contingent purchase was permissible under the then existing terms of the voting trust. There are no facts indicating any *ex parte* presentation with respect to the merits of the acquisition proceeding or in any way prejudicial to the recognized "prior rights" of North Central.

The situation here differs markedly from that presented in *Sangamon Valley Corp.* v. *United States*, 358 U.S. 49, and *WORZ* v. *Federal Communications Commission*, 358 U.S. 55, where this Court remanded cases involving decisions of the Federal Communications Commission to the Court of Appeals for further consideration in the light of information, arising subsequent to the decisions of the lower court, indicating

that *ex parte* presentations had been made to Commissioners. (1) In the F.C.C. cases, the communications related to the merits of a pending case. In the instant case, the conversations between the Board members and the employees' group did not relate to the merits of the North Central acquisition. The purpose of the discussions was not to influence the Board's decision in the North Central acquisition case, but to ascertain whether, if the North Central acquisition did not take place, the Board would view the employees' proposal as an alternative method of compliance with the Board's prior order requiring termination of the Weesners' relationship with Lake Central. (2) In the F.C.C. cases, the discussions took place at a time when the pending cases which they concerned were under active consideration by the Commission. In the instant case, they occurred at a time when the acquisition proceedings were dormant and when it appeared that, because of North Central's critical financial position, they were unlikely ever to come under active consideration. (3) In the F.C.C. cases, the *ex parte* conversations were secret and clandestine, and were brought to light not during the agency or judicial proceedings, but in investigation proceedings before a Congressional committee. In the instant case, the fact of the *ex parte* discussions was made a matter of public record set forth in the hearing before the agency, and was known to all the parties but challenged by none of them.

Here the Court of Appeals, which is especially alert in dealing with questions of this character,[9] has on its own initiative fully examined into a matter which petitioner did not deem of sufficient import to raise before either the Board or the court below, and has determined that no grounds existed for remanding the case because of the *ex parte* conversation between the employees' group and the Board members. Since the matter has been thoroughly canvassed in the court below, and since that court has concluded that the facts with respect to the *ex parte* presentations in the instant case do not warrant remand to the agency involved, as has been ordered in other cases, the decision below does not appear to call for review here.

4. The Court of Appeals' approval of the Board's decision on its merits clearly presents no question warranting review by this Court. Petitioner's contentions that the Board's decision departed from established "norms" applied in similar cases, and was not supported by substantial evidence or adequate ultimate or basic findings of fact, were fully considered by the court and found to be lacking in merit. As the court below held, the Board's determination that a merger of two non-complementary local service

[9] In *Sangamon*, the Court of Appeals, on May 8, 1959, remanded the case to the Federal Communications Commission to hold an evidential hearing into the various *ex parte* presentations. See also *Massachusetts Bay Telecasters* v. *Federal Communications Commission*, 261 F. 2d 55 (C.A. D.C.), and *WKAT, Inc.* v. *Federal Communications Commission*, 258 F. 2d 418 (C.A. D.C.), where the Court of Appeals had remanded proceedings to the Commission to explore charges of *ex parte* presentations in adjudicatory proceedings while they were in hearing status.

"feeder" carriers would not be consistent with the public interest for the basic reasons for which such carriers are certificated, was wholly within the bounds of the Board's reasonable discretion under the Civil Aeronautics Act.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1959.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended (49 U.S.C. 401, *et seq.*) are as follows:

DECLARATION OF POLICY

SEC. 2 [49 U.S.C. 402] In the exercise and performance of its powers and duties under this Act, the Authority [Board] shall consider the following; among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate, transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

CERTIFICATE REQUIRED

SEC. 401. [49 U.S.C. 481] (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation: * * *

* * * * * *

ISSUANCE OF CERTIFICATE

(d)(1) The Authority [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Authority [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Authority [Board] may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules

regulations, and requirements of the Authority [Board] hereunder.

* * * * *

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

ACTS PROHIBITED

SEC. 408 [49 U.S.C. 488] (a) It shall be unlawful unless approved by order of the Authority [Board] as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever,

of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

POWER OF AUTHORITY [BOARD]

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Authority [Board], and thereupon the Authority [Board] shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Authority [Board] finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided*, That the Authority [Board] shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further*, That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or af-

filiated therewith within the meaning of section 5(8) of the Interstate Commerce Act, as amended, such applicant shall for the purposes of this section be considered an air carrier and the Authority [Board] shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition.

JUDICIAL REVIEW OF AUTHORITY'S [BOARD'S] ORDERS

ORDERS OF AUTHORITY [BOARD] SUBJECT TO REVIEW

SEC. 1006. [52 Stat. 1024, as amended by 63 Stat. 107, 49 U.S.C. 646]

* * * * *

FINDINGS OF FACT BY AUTHORITY [BOARD] CONCLUSIVE

(e) The findings of facts by the Authority [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the Authority [Board] shall be considered by the court unless such objection shall have been urged before the Authority [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

* * * * *

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